

2012 ETHICS SEMINAR

JUNE 8, 2012

Maricopa County Board of Supervisors Auditorium
Phoenix, Arizona



TAKING THE HIGH ROAD: Candor & Professionalism

Presented by:

ROBERTA TEPPER, Senior Bar Counsel
STEVE LITTLE, Assistant Ethics Counsel
State Bar of Arizona

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
1951 W. Camelback Rd., Ste. 202
Phoenix, Arizona 85015


ELIZABETH ORTIZ
EXECUTIVE DIRECTOR

KIM MACEACHERN
STAFF ATTORNEY

TAKING THE HIGH ROAD

Candor and Professionalism



Roberta Tepper, Senior Bar Counsel
 Steve Little, Assistant Ethics Counsel
 State Bar of Arizona
 June 8, 2012



Duties of prosecutors

The basics:


- ❖ Prosecutors as ministers of justice
- ❖ Case law
 - ❖ *Connick v. Thompson*, USSC
- ❖ Arizona Rules of Professional Conduct
 - ❖ ER 3.8

Arizona Rules of Professional Conduct

ER 3.8 Duties of prosecutors

- ❖ don't prosecute charge not supported by probable cause
- ❖ reasonable efforts to assure defendants have been advised of right to counsel and has had reasonable opportunity to obtain counsel
- ❖ not seek to obtain from unrepresented defendant waiver of important pretrial rights
 - ❖ right to preliminary hearing



❖ timely disclosure of evidence that tends to negate guilt or mitigates offense

❖ in connection with sentencing, disclose to defense and court all unprivileged mitigating information known to you

❖ Except when prosecutor is relieved of this responsibility by protective order of tribunal



❖ Not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

❖ The information sought is not protected from disclosure by any applicable privilege;

❖ The evidence sought is essential to the successful completion of any ongoing investigation or prosecution; and

❖ There is no other feasible alternative to obtain the information



❖ Except for statements necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose,

❖ Refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused, and

❖ Exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor from making extrajudicial statements the prosecutor could not make under ER 3.6



Proposed Changes to ER 3.8

❖ (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- ❖ (1) promptly disclose that evidence to an appropriate court or authority, and
- ❖ (2) if the conviction was obtained in the prosecutor's jurisdiction,
 - ❖ (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - ❖ (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.



Proposed Changes to ER 3.8

❖ (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

❖ Has been adopted by ID and DE.

❖ Modified rule adopted by CO, TN & WI.



Detour to ER 3.6, Trial Publicity

❖ A lawyer . . . shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

❖ Unless reasonable lawyer believes it is required to protect a client from substantial undue prejudice due to recent publicity not initiated by lawyer or lawyer's client

❖ Other exceptions



Back to ER 3.8, the comments



- ❖ Minister of justice
- ❖ Avoid increasing public condemnation of accused
 - ❖ Avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of accused
- ❖ Unique dangers of improper extrajudicial statements in a criminal case
 - ❖ Reasonable care standard satisfied if prosecutor issues appropriate cautions to law enforcement and others



So,

- ❖ The prosecutor's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done."
- ❖ Cannot retaliate in kind
- ❖ Keep your cool, it's not about you
- ❖ It matters



Some practical examples

- ❖ Vouching
- ❖ Personal knowledge or personal opinion
 - ❖ Personal opinion of defendant's guilt
- ❖ Commenting on defendant's
 - ❖ Character
 - ❖ Silence
 - ❖ Demeanor (unless he testifies)
- ❖ Referring to matters not in evidence
- ❖ Appealing to passion or prejudice
- ❖ Personal attacks on defense attorney
- ❖ Calling jury's attention to punishment or improper matters
- ❖ Misstating the law



- ❖ Vindictive prosecution
 - ❖ Never punish a defendant for exercising a legal right
- ❖ Zealous or overzealous advocacy
 - ❖ Rules of Professional Conduct
 - ❖ Sanctions
- ❖ Taking advantage of defendant representing him/herself
 - ❖ Reasonable doubt is not the same thing as justification to find the defendant not guilty
- ❖ Argumentative questioning (retorts)
- ❖ Using prior bad acts as evidence of defendant's character, arguing defendant acted in conformity with them
- ❖ Civil liability
- ❖ Mentioning failed plea negotiations



❖ Rule 41(g)

- ❖ To avoid engaging in unprofessional conduct and to advance no fact prejudicial to the honor or reputation of a party or a witness unless required by the justice of the cause with which the member is charged.
 - ❖ Generally applied in the practice of law. Other rules (8.4 and 53) apply similar standards outside of the practice of law.
 - ❖ Zealous representation has been removed from the rules



❖ Rule 41(g)

- ❖ So what is "unprofessional conduct?"

- ❖ Substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona. (Rule 31(a)(2)(E))
- ❖ What do those require?
 - ❖ (They are in the comment to Rule 31)



❖ Rule 41(g)

❖ Oath of Admission:

- ❖ Maintain respect due to courts and judges
- ❖ Don't recommend or bring unjust cases
- ❖ Use only truthful and honorable methods
- ❖ Never seek to mislead the judge or jury
- ❖ Maintain confidentiality
- ❖ Abstain from all offensive conduct
- ❖ Don't attach honor or reputation of party or witness unless necessary for the case
- ❖ Don't reject or delay cases for greed or malice



❖ Rule 41(g)

❖ Lawyer's Creed of Professionalism:

- ❖ Not engage in tactics that are intended to delay, harass or drain the financial resources of the opposing party
- ❖ Be courteous and civil
- ❖ Agree to reasonable requests for extensions when the interests of the client will not be affected
- ❖ Not engage in excessive or abusive discovery
- ❖ Conduct yourself with dignity, avoid groundless objections, not be rude or disrespectful



❖ Rule 41(g)



❖ Tips for prosecutors:

- ❖ Take the high road when dealing with unreasonable and/or rude people
 - ❖ Especially in the courthouse hallway!
- ❖ Remember, the obligations apply even when dealing with pro-se litigants, witnesses, defendant's family, etc...
- ❖ Don't oppose extensions and continuances when there's no good cause to oppose other than to harass



❖ Rule 41(g)

- ❖ What about when the other side is inappropriate?
 - ❖ Document and keep track
 - ❖ This helps build a record showing a pattern
- ❖ Confront?
 - ❖ Sometimes pointing out how unnecessary hyper-aggressive tactics are is effective
 - ❖ If not, you may want to deal in writing with them
- ❖ Report?
 - ❖ Discuss with your office whether there is a mandatory reporting situation under 8.3. Or call the Ethics Hotline



❖ Rule 41(g)

- ❖ Some recent 41(g) cases:
 - ❖ Attorney called medical record clerks “sluts” and used other inappropriate language.
 - ❖ [One year suspension]
 - ❖ Prosecutor engaged in physical altercation with criminal defendant at a local casino.
 - ❖ [Admonition]
 - ❖ Defense attorney engaged in sexual relationship with judge whom she was regularly appearing before.
 - ❖ [Reprimand]



❖ Rule 41(g)

- ❖ Defense attorney used abusive language and lunged at the prosecutor in open court.
 - ❖ [Six month suspension]
- ❖ Attorney, after prevailing at a hearing, got intoxicated and went to salon owned by opposing party, where she yelled at and slapped an employee. (Other misconduct also involved)
 - ❖ [One year suspension]
- ❖ Attorney exposed himself to a UPS truck driver.
 - ❖ [Four month suspension]



Candor to the Tribunal

ER 3.3(a)

❖ Lawyer shall not knowingly:

- ❖ Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer
- ❖ Fail to disclose legal authority in the controlling jurisdiction known by the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel



- ❖ Offer evidence that the lawyer knows to be false.
If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- ❖ The lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.



ER 3.3(b)

- ❖ A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal



ER 3.3(c) and (d)

- ❖ Duties in (a) and (b) apply to the conclusion of the proceeding, even if compliance requires disclosure of information otherwise protected by ER 1.6
- ❖ In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.



Guidance from the Comments

- ❖ If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered.
- ❖ If persuasion is ineffective, the lawyer must refuse to offer the false evidence.



- ❖ If a criminal defendant wishes to testify falsely, and the lawyer continues to represent the client, counsel must first attempt to persuade the accused to testify truthfully or not at all.
- ❖ If the client persists, counsel must proceed in a manner consistent with the accused's constitutional rights.
- ❖ The obligation of the advocate under the Rules is subordinate to such constitutional requirements.
Unless lawyer KNOWS the client's testimony is false, the lawyer must honor client's decision to testify.



Remedial Measures

- ❖ Reasonable remedial measures
- ❖ Advise client of duty to tribunal and seek cooperation of client (withdraw or correct)
- ❖ If withdrawal not permitted, or will not undo the effect of the false evidence, lawyer must make disclosure to tribunal even if that requires lawyer reveal information otherwise protected by ER 1.6.



Related ERs

- ❖ ER 1.6
- ❖ ER 8.4(c) It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation



Case Law

- ❖ *In re Alcorn & Feola*, 202 Ariz. 62
- ❖ *In re Moak*, 205 Ariz. 351
- ❖ *In re Peasley*, 208 Ariz. 27
- ❖ *In re Zawada*, 208 Ariz. 232
- ❖ *In re Arrotta*, 208 Ariz 509



Case Law

- ❖ *In re Everett*, SB-05-0166-D (2006)
- ❖ *In re Finander*, SB-05-0157-D (2006)
- ❖ *In re Morrison*, SB-06-0068-D (2006)
- ❖ *In re Robbins*, SB-06-0026-D (2006)
- ❖ *In re Gregory*, SB-05-0161-D (2006)
- ❖ *In re Risley*, SB-05-0015-D (2006)



And also . . .

- ❖ *In re Watkins*, SB-07-0062-D (2007)
- ❖ *In re Cayce*, SB-06-0177 (2007)
- ❖ *In re MacPherson*, SB-08-0079-D (2008)
- ❖ *In re Matheny*, SB-08-0033-D (2008)
- ❖ *In re McWhorter*, SB-07-0190-D (2008)



❖ Getting Help

- ❖ Where can you go for help?
 - ❖ Ethics Hotline – 602-340-7284
 - ❖ Trust Accounting Hotline – 602-340-7305
 - ❖ Unauthorized Practice of Law Hotline – 602-340-7292
 - ❖ Fee Arbitration – 602-340-7288
 - ❖ Members' Assistance Program – 602-340-7334
 - ❖ MAP 24hr Crisis Hotline – 1-800-681-3057
 - ❖ Law Office Management Assistance – 602-340-7313
 - ❖ Membership Records – 602-340-7239
 - ❖ Report Attorney Misconduct – 602-340-7280